Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules, and Processes	)	MM Docket No. 98-43
	)	
Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities	)	MM Docket No. 94-149
	)	

TO: The Full Commission

PETITION FOR RECONSIDERATION

Pursuant to Section 405 of the Communications Act, 47 U.S.C. Section 405, Michael L. Horvath ("Horvath"), by his attorney, hereby respectfully requests the full Commission to reconsider its Report and Order, FCC 98-281, released November 25, 1998, as follows:[1]

I. Petitioner and His Interest in this Proceeding.

1. Petitioner, Michael L. Horvath, is the licensee of AM Broadcast Station WZUM, Carnegie, Pennsylvania, a station which operates on the frequency 1590 kHz, daytime only. Petitioner acquired the station from Hickling Broadcasting, Inc., pursuant to Commission consent. At the time when Mr. Horvath acquired the ownership of the station, the station's licensed 1 KW directional facilities had been

[1]The Report and Order was published in the Federal Register on December 18, 1998, at 63 FR 70039. Therefore, the time for filing Petitions for Reconsideration (30 days) did not commence to run until December 18, 1998, and this petition is timely. See 47 C.F.R. Section 1.4 (b)(1), and 47 U.S.C. Section 405.

dismantled by the previous owner, and towers had been constructed for a new 5 KW facility, using a three tower directional antenna system, authorized in a pending construction permit. Since the construction of the 5 KW facilities had never been completed, the station was operating non-directionally, with 250 watts, power, pursuant to a special temporary authority, issued under the construction permit.

2. In October 1997, Mr. Horvath signed an agreement to purchase Station WZUM from Hickling Broadcasting, Inc. Immediately thereafter, an application was filed for FCC consent to the assignment of the station's license from Hickling Broadcasting Inc. to Mr. Horvath. The application was granted on April 28, 1998, but, because a renewal application was pending, the Commission forbade Horvath from consummating the assignment until after the renewal was granted. This did not occur until July 24, 1998, and closing took place shortly thereafter on August 21, 1998.

3. During the process of acquiring ownership of the station, Mr. Horvath discovered that the Borough of Crafton was planning to purchase the transmitter site from Hickling Broadcasting Inc., for unpaid taxes, and to use the site for a public park. Informally, the Borough offered to allow Mr. Horvath to move the station to another parcel of land owned by the Borough, and lease that property from the Borough. Mr. Horvath has applied to the FCC for a modification of his construction permit to use this alternate site, but, so far, the FCC has yet to grant the modification application. Moreover, despite urgent - even desperate - efforts by Horvath and his attorney to finalize the lease with the Borough, the city fathers have yet to act on the matter. Thus, Station WZUM continues to operate non-directionally with 250 watts power under an special temporary authority issued pursuant to the existing 5 KW construction permit, and on land which is in the process of being condemned by the Borough for unpaid taxes. It does not appear that this impasse is likely to be resolved, in the near future. Therefore Mr. Horvath will

probably need an extension of his construction permit.

4. In this proceeding, the Commission has adopted new rules, which abolish applications for extensions of construction permits, and make it virtually impossible to extend construction permits under any circumstances. As will be shown, Mr. Horvath had no notice that such rules would be adopted and applied to him at the time when he acquired the construction permit and license for Station WZUM. As will be further demonstrated, the application of these new rules to Mr. Horvath would work great hardship on Horvath, and other similarly affected applicants, and would impermissibly deprive Horvath of due process of law.

II. The New Rules Cannot Be Retroactively Applied to Horvath.

5. It is well established that where, as here, an agency adopts legislative rules, *i.e.*, rules which are adopted pursuant to notice and comment under the Administrative Procedure Act, those rules may not be applied retroactively. In *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235 (1997), the Court of Appeals explained that:

> "CCI has confused the law governing the retroactive application of administrative rules developed, as in Yakima, in the course of an agency adjudication with those, such as subsection 90.629(e), that an agency has adopted as the result of a rulemaking under the Administrative Procedure Act ('APA'). As we pointed out in Georgetown Univ. Hosp. v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987), aff'd on other grounds, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the APA requires that legislative rules [i.e., rules adopted pursuant to the notice and comment procedures of the APA, 5 U.S.C. Section 553] be given future effect only. [Therefore], equitable considerations are irrelevant to the determination of whether the [agency's] rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA." 113 F.3d at p. 240.

6. The test of whether a rule is retroactive is whether it impairs rights a party possessed when it acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed. *Chadmoore*, 113 F.3d at p. 241, citing *DIRECTV, INC. v. FCC*, 110 F.3d 816, 825-

826 (D.C. Cir., 1997) (quoting *Landsgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Here, Mr. Horvath bought the license and construction permit for Station WZUM at a time when the rules (47 C.F.R. Section 73.3534 (b)) entitled the holder of a construction permit to an extension where, as here, "no progress has been made for clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." Mr. Horvath paid good money for the license and construction permit, in reliance upon these rules. To change those rules in such a way as to deprive Horvath of the prospect of an extension to which he would clearly have been entitled under the old rules obviously impairs rights which Horvath had when he bought Station WZUM.

7. The new rules also increase Horvath's liability for past conduct. Under the rules, a permit is good for three years. However, in calculating the three year term, the rules date the commencement of the term from the date of issuance of the original permit. The original permit was issued to the former owner of the station, more than three years ago, so that the three year term has already expired. Mr. Horvath had absolutely nothing to do with the construction delays, created by the former owner. Thus, Mr. Horvath is not only being punished for "past conduct"; he is being punished for the past conduct of someone else, over which he had no control.

8. Finally, the new rules impose new duties with respect to transactions already completed. The purchase of Station WZUM is a completed transaction. The station was bought on the assumption that the rules would provide enough time to complete construction under the permit. Changing the rules to make it impossible to extend the permit obviously imposes a new duty that was not present when Horvath bought the station, *i.e.*, a duty to overcome obstacles which may be insurmountable, in order to preserve the station's operating authorizations. Thus, all three of the elements of the retroactivity test

are violated by these new rules.

9. Petitioner recognizes that, in *Chadmoore*, the Court of Appeals held that the FCC had the right to deny an extension application because of a change in the rules, predicated upon a rule making proceeding, the goal of which was to put into effect a new system of competitive bidding for specialized mobile radio system ("SMR") licenses. The Court reasoned that, although the appellant had filed an application for extension, it had no "vested right" to a grant of the application. The Court pointed out, however, that the FCC did not mention the new rule as the reason for denying the extension. Rather, the extension was denied as a result of proceedings, as to which the appellant (which had an enormous SMR system with 2,312 stations in 26 states) had notice, which made it imprudent to assume that FCC would continue to grant such extensions. *Chadmoore*, at pps. 241-242. As will be explained, the FCC did not give Horvath any similar notice that his construction permit would be made subject of the Draconian rules adopted in this proceeding. Quite the contrary.

III. The Rules Adopted in this Proceeding Cannot Be Applied to Take Horvath's Property Without Due Process of Law.

10. There is a separate, independent reason why the rules adopted in this proceeding cannot be applied to Horvath. In *Chadmoore*, it appears that the authorizations held by the appellant were granted *free gratis*, *i.e.*, that the appellant obtained the authorizations from the FCC without paying one dime for them. At least no argument was made to the contrary to the Court of Appeals and, if the argument could have been made that the appellant had a substantial investment in the authorizations, the appellant certainly would have made that argument.

11. Here, Horvath paid good money for Radio Station WZUM. It is sophistry to argue that he did not pay for the license and construction permit. Indeed, since the property upon which the radio station is located is being taken by the Borough of Crafton, Horvath purchased almost nothing except

a license and a construction permit. In this proceeding, moreover, the FCC proposes to allow construction permits to be freely bought and sold with no restraints on the amounts that may be paid for them. This sounds very much like the purchase and sale of property.

12. At the time when Horvath purchased the radio station, reasonable rules were in effect, providing for extensions of construction permits under reasonable circumstances. Horvath relied upon those rules in making his decision to purchase the station, knowing full well that there could be problems with the Borough of Crafton. To now suddenly change those rules to preclude extensions, under even the most reasonable of circumstances, is to take Horvath's property without due process of law. That cannot be permitted. *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).

IV. Horvath Had No Notice of the Rules Adopted in this Proceeding When He Bought WZUM.

13. This proceeding had its genesis in a Notice of Proposed Rule Making ("NPRM"), released April 3, 1998, and published at 13 FCC Rcd 11349. By the time the NPRM came out, Horvath had already entered into a contract to buy Station WZUM, and had filed an application for FCC consent to do so. Furthermore, the 5KW construction permit, which serves as the station's basic operating authorization, was long since beyond its initial period of effectiveness. In the NPRM, the FCC did, in fact, give notice that, in the future, it intended to issue permits for a three year term, and to allow extensions only for narrowly defined "Acts of God." However, with respect to old permits, such as the one purchased by Horvath, the Commission said the following, at paragraph 68 of the NPRM:

> "68. *Application of New Rules to Outstanding Permits.* Finally, we propose that the rules regarding construction permits, and extensions thereof, that we adopt in this rulemaking proceeding to be applied to any construction permit that is currently in its initial construction period (*i.e.*, the first 24 months for a full power TV facilities permit and the first 18 months for an AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator, FM booster, or broadcast auxiliary permit). We invite comment on how to implement our proposal and whether implementation would cause

> unjustifiable hardship to permittees or would result in a disservice to the public. We believe, however, that it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification). Because many of these permits have already been afforded a construction period close to (or, in many instances, in excess of) the three-year term proposed in this *Notice*, we propose to continue to apply the rules as they exist today to permits outside their initial periods. We invite comment on the tentative conclusion that it is more appropriate to continue to apply our current rules to construction permits that are beyond their initial periods." 13 FCC Rcd 11349, 11374 (footnotes omitted)

Thus, the FCC proposed to continue to apply its "current rules," *i.e.*, its "old rules" to permits such as the one held by Mr. Horvath. Comments were filed by a number of parties to the proceeding, but no commentator disagreed with the tentative conclusions set forth in paragraph 68 of the NPRM, so far as those conclusions suggested that Horvath and others in his position would be subject to the old rules. Therefore, the FCC had no record on which to overturn those conclusions. Yet it did so, anyway.

14. Under the old rules, applications for an extension of a construction permit were evaluated on the basis of the progress made by an extension applicant during the last time period during which his construction permit was in full force and effect. *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991); see also, *Joseph I. Kendrick*, 11 FCC Rcd 19635 (1996). Under those rules, a permit would be extended, even if there was no progress, if the lack of progress stemmed from circumstances clearly beyond the control of the applicant. The old rules were, in short, reasonable. The new rules, which essentially prohibit extensions, are not. They are, Horvath respectfully suggests, arbitrary and capricious.

15. But that is beside the point. As shown, the FCC never proposed to apply the new rules to Horvath or to other similarly affected applicants with construction permits outside their initial period of effectiveness. Horvath and other similarly affected applicants spent good money in reliance upon reasonable rules, which, with no notice, have abruptly been terminated and replaced with unreasonable rules. This action cannot be allowed to stand.

V. Relief Requested.

16. For the reasons set forth above, Horvath respectfully requests that the Commission reconsider its Report and Order in this proceeding, and make it clear that, as proposed in the NPRM, applications for extension of construction permits outside their initial periods (*i.e.*, "old permits") will continue to be entertained and processed under the rules which heretofore applied, namely, Sections 73.3534 and 73.3535 of the Commission's Rules and Regulations (47 C.F.R. Sections 73.3534-73.3535).

WHEREFORE, it is respectfully requested that the full Commission reconsider its Report and Order, released November 25, 1998, as described above.

Respectfully submitted,

January 5, 1999

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